(discussing the evolution of the NTSC standard and noting that "the NTSC transmission standard has proven to be remarkably durable and adaptable to changes over the years").

[5] *In the Matter of Further Sharing of the UHF Television Band by Private Land Mobile Radio Services*, Notice of Proposed Rule Making, 101 FCC 2d 852 (1985). *See also* JOEL BRINKLEY, DEFINING VISION: THE BATTLE FOR THE FUTURE OF TELEVISION (1997).

[6] *Notice of Inquiry on ATV*, *supra* note 4.

[7] *In the Matter of Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*, First Report and Order, 5 FCC Rcd 5627, 5628 (1990).

[8] *Id.*

[9] *In the Matter of Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*, Fifth Report and Order, 12 FCC Rcd. 12809, 12820 (1997) (*Fifth Report and Order*).

[10] The seven members of the Grand Alliance were AT&T (now Lucent Technologies), General Instrument Corporation, Massachusetts Institute of Technology, Philips Electronics North American Corporation, Thomson Consumer Electronics, The David Sarnoff Research Center, and Zenith Electronics Corporation. *See Fourth Report and Order, supra* note 1, at 17774, n.10.

[11] *In the Matter of Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*, Fifth Further Notice of Proposed Rule Making, 11 FCC Rcd 6235 (1996).

[12] *Fourth Report and Order, supra* note 1.

[13] *Fifth Report and Order*, supra note 9, 12 FCC Rcd at 12826.

[14] *Id.* at 12826-27.

[15] The Balanced Budget Act of 1997 Act directs the FCC to auction the so-called analog spectrum in 2002. The spectrum may be returned to the FCC and reassigned as early as 2006. 47 U.S.C. § 309(j)(14)(A)-(C) (1998).

[16] 47 U.S.C. 336(e)(2)(B).

[17] *Fees for Ancillary or Supplementary Use of Digital Television Spectrum Pursuant to Section 336(e)(1) of the Telecommunications Act of 1996,* Report and Order, MM Docket No. 97-247. Adopted Nov. 19, 1998; Released Nov. 19, 1998.

[18] *Ancillary or Supplementary Use of Digital Television Capacity by Noncommercial Licensees,* Notice of Proposed Rulemaking, MM Docket No. 98-203 (Nov. 19, 1998).

[19] *Fifth Report and Order, supra* note 9, at 12840-41.

[20] Remarks of William E. Kennard, Chairman, Federal Communications Commission to the "Dawn of Digital Television" Summit Meeting, Washington, D.C. (Nov. 16, 1998)(visited Nov. 18, 1998) <http://www.fcc.gov/Speeches/Kennard/spwek834.html>.

[21] Balanced Budget Act of 1997, Pub. L. No. 105-33 § 3003, 111 Stat. 251, 267 (1997). Some industry observers question whether the full transition to DTV and the return of analog spectrum will be consummated by 2006, as intended by the Balanced Budget Act of 1997. This view stems from doubts about consumer enthusiasm for DTV if sets are too expen-

sive and, in turn, a likely triggering of the two contingency clauses adopted by Congress in 1997.

Based on existing projections of the market penetration of DTV over the next 8 years, many analysts believe it is unlikely that 85 percent of households will be equipped to receive DTV by 2006. Josh Bernoff, a principal analyst with Forrester Research, an independent market research firm based in Cambridge, Massachusetts, estimates that only 23 percent of U.S. households (nearly 20 million) will have DTV sets by 2004 and only 48 percent (42 million) by the year 2007. *See* Statement by Josh Bernoff, Forrester Research, Transcript of Meeting of the Advisory Committee on the Public Interest Obligations of Broadcasters, at 33-34 (Jan.16, 1998) (on file with the Advisory Committee Secretariat).

[22] Statement by Bruce Allan, Vice President and General Manager of the Harris Corporation's Broadcasting Division, Transcript of Meeting of the Advisory Committee on the Public Interest Obligations of Broadcasters, at 16 (Jan. 16, 1998) (on file with the Advisory Committee Secretariat).

[23] *Id.* The survey interviewed 401 television executives who represent approximately 480 stations. *Id.* at 12.

[24] Statement by Josh Bernoff, to Advisory Committee on the Public Interest Obligations of Digital Broadcasters, *supra* note 22 at 79 (Jan. 16, 1998)("If you look at the fragmentation [of the existing TV marketplace], it's possible to imagine a world in which there's all of this wonderful programming. But if you look at the fragmentation that's happened so far with things like cable, a lot of what is available is reruns of prime time fare....Maybe we'll have the ability to see *Three's Company* at seven different times during the day, but I'm not sure that there's the capability to produce all of this original programming, given that the audience for the lepidoptery channel is not likely to be that large.").

[25] Statements by Josh Bernoff, Forrester Research, and Robert W. Decherd, Chairman of A.H. Belo Corporation, to Advisory Committee on the Public Interest Obligations of Digital Broadcasters, *Id.* at 53, 82-84. If new permutations of ownership and blurring of media technologies do occur, some observers envision a rivalry between the personal computer and television, or perhaps a novel blending of the two media. Already, Intel and Zenith are collaborating on a digital TV decoder card for PCs, an innovation that could open up the PC market to digital television. *Id.* at 23. On the other hand, there are reasons to believe that PCs and TV will remain distinct media. The experience of interacting with a PC from a distance of 12 to 18 inches is quite different from relaxing in front of a TV screen, which is best viewed from 6 to 10 feet away (and even further for big-screen HDTV). And adding interactive features to TV programming would entail great expense, competition among several different technical protocols, and the absence of an established audience.

[26] *Id.* at 20. *Advanced Television Systems and their Impact upon the Existing Television Broadcast Service,* Order on Reconsideration, MM. Docket No. 87-268 (Feb. 17, 1998) (affirming DTV channel assignments).

[27] Letter from William E. Kennard, Chairman, Federal Communications Commission, to Decker Anstrom, President and CEO, National Cable Television Association and Gary

Shapiro, President, Consumer Electronics Manufacturers Association (Aug. 13, 1998)(visited Dec. 7, 1998) <http://www.fcc.gov/Speeches/Kennard/Statements/stwek862.html> (urging that the cable industry, electronics manufacturers coordinate efforts to resolve compatibility problems between first-generation digital television sets and cable systems). *See also* Joel Brinkley, "*FCC Wants HDTV Glitch Solved Soon*," THE NEW YORK TIMES, Aug. 24, 1998, at D4.

[28] Gary Arlen, *Making the Transition: A New Kind of Television, A White Paper* 19 (April 1998) (on file with the author) (predicting that new digital equipment may cost barely 20 percent more than today's comparable analog facilities, which suggests that the most cost-efficient way to proceed is scaled purchases of DTV equipment that parallel development of the market).

[29] Joel Brinkley, "*HDTV: High in Definition, High in Price*," THE NEW YORK TIMES, (Aug. 20, 1998), at G1.

[30] *Id.*

[31] *Id.*

[32] 47 U.S.C. § 534(b)(4)(B)(1998). *See also In the Matter of Carriage of the Transmissions of Digital Television Broadcast Stations, Amendments to Part 76 of the Commission's Rules,* Notice of Proposed Rule Making, 13 FCC Rcd 15092 (1998) (*Carriage of the Transmissions of Digital Television*).

[33] *Turner Broad. Sys., Inc. v. FCC,* 520 U.S. 180 (1997).

[34] *Carriage of the Transmissions of Digital Television, supra* note 32.

[35] *In the Matter of Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement and Construction of Broadcast Station Transmission Facilities,* Notice of Proposed Rule Making, 12 FCC Rcd 12504 (1997).

[36] *Id.* at 12504, n.1.

[37] 47 U.S.C. § 336(d)(1998).

Section II.
The Public Interest Standard in Television Broadcasting

Federal oversight of all broadcasting has had two general goals: to foster the commercial development of the industry and to ensure that broadcasting serves the educational and informational needs of the American people. In many respects, the two goals have been quite complementary, as seen in the development of network news operations and in the variety of cultural, educational, and public affairs programming aired over the years.

In other respects, however, Congress and the Federal Communications Commission (FCC) have sometimes concluded that the broadcast marketplace by itself is not adequately serving public needs. Accordingly, numerous efforts have been undertaken over the past 70 years to encourage or require programming or airtime to enhance the electoral process, governance, political discourse, local community affairs, and education. Some initiatives have sought to help underserved audience-constituencies such as children, minorities, and individuals with disabilities.

In essence, the public interest standard in broadcasting has attempted to invigorate the political life and democratic culture of this Nation. Commercial broadcasting has often performed this task superbly. But when it has fallen short, Congress and the FCC have developed new policy tools aimed at achieving those goals. Specific policies try to foster diversity of programming, ensure candidate access to the airwaves, provide diverse views on public issues, encourage news and public affairs programming, promote localism, develop quality programming for children, and sustain a separate realm of high-quality, noncommercial television programming.

It has been an ambitious enterprise, imperfectly realized. Part of the challenge has been to use public policy, with all its strengths and limitations, to integrate vital public goals into a commercial milieu. This challenge has been complicated in recent years by rapid and far-reaching changes in technology and market structures, not to mention evolving public needs. As competition in the telecommunications marketplace becomes more acute and as the competitive dynamics of TV broadcasting change, the capacities of the free marketplace to serve public ends are being tested as never before.

Before presenting the Advisory Committee's recommendations for how the public interest standard in broadcast television should evolve in the digital era, it is important to understand the historical forces that have shaped the public interest standard. This section of the Report begins with a discussion of the origins and development of the public interest standard, with special attention to the role of spectrum scarcity and Government licensing in creating the "public trustee" model of broadcast regulation. It concludes with an examination of six primary realms of public interest concern in broadcast television: diversity of programming, political discourse, localism, children's educational programming, access for persons with disabilities, and equal employment opportunity.

The Origins of the Public Interest Standard

Spectrum Scarcity and the Public Trustee Model

A recurring challenge for Congress and the FCC has been how to reconcile the competitive commercial pressures of broadcasting with the needs of a democracy when the two seem to be in conflict. This struggle was at the heart of the controversy that led to enactment of the Radio Act of 1927 and the Communications Act of 1934.[1]

Under the antiquated Radio Act of 1912, the Secretary of Commerce and Labor was authorized to issue radio licenses to citizens on request.[2] Because broadcast spectrum was so plentiful relative to demand, it was not considered necessary to empower the Secretary to deny radio licenses. By the 1920s, however, unregulated broadcasting was causing a cacophony of signal interference, which Commerce Secretary Herbert Hoover was powerless to address. The lack of a legal framework for regulating broadcasting not only prevented reliable communication with mass audiences but also thwarted the commercial development of broadcasting.

Thus began an extended debate over how to allocate a limited number of broadcast frequencies in a responsible manner. A prime consideration was how to ensure the free speech rights of the diverse constituencies vying for licensure. Some groups—especially politicians, educators, labor activists, and religious groups—feared that, under a system of broadcast licensing, their free speech interests might be crowded out by inhospitable licensees, particularly commercial interests. They therefore sought (among other policy remedies) a regime of common carriage. A common carrier system would have ensured nondiscriminatory access by requiring broadcasters to allow anyone to buy airtime.

For their part, existing broadcasters sought to maintain editorial control and to develop the commercial potential of forging individual stations into national networks. They wanted Congress to grant them full free speech rights in the broadcast medium and did *not* want to be treated as common carriers.

This basic conflict was resolved provisionally with passage of the Radio Act of 1927, and 7 years later, by the Communications Act of 1934. The 1934 Act, which continues to be the charter for broadcast television, ratified a fundamental compromise by adopting two related provisions: a ban on "common carrier" regulation (sought by broadcasters) and a general

requirement that broadcast licensees operate in the "public interest, convenience and necessity" (supported by Congress and various civic, educational, and religious groups).[3] The phrase was given no particular definition; some considered it necessary for the Federal Government's licensing powers to be considered constitutional.[4]

By prohibiting a common carriage regime, Congress essentially prohibited non-licensees from having free speech rights in the broadcast medium except as authorized by "public interest" requirements. Only Government-sanctioned licensees would, as a rule, have free speech rights in broadcasting. Although the limited number of licensees was in one respect dictated by the physics of the electromagnetic spectrum (only so many stations could operate without chaos resulting), the "scarcity" was also dictated by the Government licensing scheme, which banned a regime of common carriage and made arbitrary divisions of spectrum space for particular reserved uses. The scarcity of access to the airwaves is, in this sense, a creature of Government licensure.

The Government's exclusionary licensing arrangement was justified by requiring that broadcasters act as public fiduciaries. Their primary duty would be to serve the "public interest, convenience and necessity," as expressed in both the 1927 and 1934 Acts.[5] Created by the 1927 Act, the Federal Radio Commission described the "public trustee" model in this manner:

> [Despite the fact that] the conscience and judgment of a station's management are necessarily personal....the station itself must be operated as if owned by the public....It is as if people of a community should own a station and turn it over to the best man in sight with this injunction: "Manage this station in our interest." The standing of every station is determined by that conception.[6]

To give substance to the public interest standard, Congress has from time to time enacted its own requirements for what constitutes the public interest in broadcasting. But Congress also gave the FCC broad discretion to formulate and revise the meaning of broadcasters' public interest obligations as circumstances changed.[7]

The FCC's authority, while extensive, is constrained by traditional First Amendment principles. The Federal Government may not censor broadcasters, for example, nor may it regulate content except in the most general fashion, including favoring broad categories of programming such as public affairs and local programming.[8] The FCC can intervene to correct perceived inadequacies in overall industry performance, but it cannot trample on the broad editorial discretion of licensees.

As the foregoing history suggests, the fundamental legal framework that governs the broadcast industry sets it apart from other media. In broadcasting, the Federal Government grants exclusive free speech rights to licensees, while denying such freedom to others. To justify this privileged treatment, Congress and the courts have mandated that licensees serve as "public trustees" of the airwaves.

The public trustee model has given rise to a distinct genre of First Amendment jurisprudence. Unlike newspapers and magazines, broadcasters have affirmative statutory and regulatory

obligations to serve the public in specific ways. Despite the philosophical complications and political tensions that this arrangement entails, the U.S. Supreme Court has repeatedly upheld the public trustee basis of broadcast regulation as constitutional.[9] The reason that broadcasters have substantial, but not complete, First Amendment protection, said the Court, is the scarcity of broadcasting frequencies and the Government licensing that is necessary:

> When there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish....A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens.[10]

Therefore, the Government may require a licensee "to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves."[11]

Although many commentators have challenged the reasoning of the *Red Lion* case, it stands as the operative ruling in this area.[12] Much of the criticism focuses on how the "scarcity rationale" has been invalidated by the proliferation of new media outlets. Many broadcasters and others also argue that scarcity is a basic economic fact of life affecting all media, so why should it justify broadcast regulation?[13] Defenders of *Red Lion* assert that there are still more applicants for broadcast licenses than available licenses—a basic definition of scarcity—and that Government selection of one licensee over another justifies the continuing application of the public interest standard.

Broadcast Television and Democratic Deliberation

The licensing arrangements that gave rise to public interest obligations were an attempt to reconcile the prerogatives of commercial interests on the one hand with the needs of the democratic system on the other. Yet they also introduced tensions in First Amendment jurisprudence and gave rise to different visions of free speech.

One vision, often associated with Justice Oliver Wendell Holmes, sees the First Amendment as a guarantor of the "free marketplace of ideas" against Government encroachment.[14] Under this familiar metaphor, a "free trade in ideas" in a pluralistic society will yield the most freedom, the closest approximations to truth, and the greatest common good.

An overlapping perspective with a different emphasis is associated with James Madison, the great champion of free speech during the framing of the Constitution and Bill of Rights. For Madison, the First Amendment was important as a way to ensure political equality, especially in the face of economic inequalities, and to foster free and open political deliberation.[15] This conception of the First Amendment sees free speech as servicing the civic needs of a democracy. Free speech, in Madison's view, expresses the sovereignty of the people. Justice Louis

Brandeis, also associated with this vision of the First Amendment, emphasized the vital role of citizens in coming together as political equals to engage in rational political discussion.[16] In Brandeis's view, free speech is not just an end unto itself, or simply a freedom from Government meddling; it is also a necessary means for democratic self-governance.[17]

The philosophical distinction between the free marketplace of ideas metaphor and the Madisonian notion of a deliberative democracy is not academic. It lies at the heart of the public interest standard in broadcasting. From the beginning, broadcast regulation in the public interest has sought to meet certain basic needs of American politics and culture, over and above what the marketplace may or may not provide. It has sought to cultivate a more informed citizenry, greater democratic dialogue, diversity of expression, a more educated population, and more robust, culturally inclusive communities.

The Madisonian concept of free speech helps clarify, then, why public interest obligations have been seen as vital to broadcast television—and why a marketplace conception of free speech may meet many, but not all, needs of American democracy. As constitutional scholars have noted, the famous "marketplace of ideas" metaphor associated with Justice Holmes presumes that diverse ideas have the ability to compete for public acceptance.[18]

Some scholars say the marketplace metaphor obscures the extent to which political outcomes require active deliberation and debate.[19] This requires public fora that can give serious, sustained attention to different perspectives. These public fora must be open and accessible to divergent viewpoints, and they must be able to facilitate citizen participation in matters of democratic concern.[20] The marketplace may or may not serve these needs well. When Congress and the FCC have determined that public policy is needed to fulfill conditions that Madison saw as primary to the First Amendment, they have developed new applications of the public interest standard.

Another view of the First Amendment, propounded by many broadcasters and others, is that the marketplace alone is the best guarantor of diversity of expression. According to this perspective, Government's role is likely to be intrusive and inimical to diverse expression; only a robust, free marketplace can duly honor the free speech rights of speaker and listener. As one commentator from this perspective writes:

> The question of whether or not an unregulated marketplace produces "enough" valuable speech, or conversely, "too much" worthless or harmful speech, assumes an ability to determine the optimal amount separate from the voluntary choices of speakers and listeners. It presumes that the "public interest" should outweigh traditional First Amendment concepts of speaker and listener autonomy.[21]

By this view, any Government policy that presumes to affect the content of broadcasting (such as limitations on advertising, guidelines for public affairs programming, or requirements for children's educational programming) represents an abridgement of broadcasters' First Amendment rights.

The philosophical disagreements between the marketplace and Madisonian interpretations of the First Amendment have ebbed and flowed over time. But in general, when Congress or the FCC have applied the public interest standard, they have cited the need to help American democracy function more effectively and to help civic culture thrive. While some applications of the public interest standard have been highly controversial, others have gained wider acceptance and proven quite durable.

The public interest standard has most often been applied to six major arenas: diversity of programming, political discourse, localism, children's educational programming, access to persons with disabilities, and equal employment opportunity.

The Primary Applications of the Public Interest Standard

Encouraging Diversity of Programming

If broadcasters are meant to act as trustees for the public interest, then a corollary is that they must affirmatively present a wide diversity of perspectives. This is clearly a central role of the First Amendment and the reason why the Federal Government from the beginning of broadcasting has sought to encourage programming diversity.

The first major initiative in this regard was a set of guidelines known as *Great Lakes Broadcasting Co.*, issued by the Federal Radio Commission (FRC) in 1929. To assess the performance of licensees under the public interest standard, the FRC declared that a station should meet the

> tastes, needs and desires of all substantial groups among the listening public...in some fair proportion, by a well-rounded program, in which entertainment, consisting of music of both classical and lighter grades, religion, education and instruction, important public events, discussions of public questions, weather, market reports, and news, and matters of interest to all members of the family, find a place.[22]

The FRC held that programming along these lines would be considered part of a station's public interest obligation at the time of license renewal. Apart from pushing "propaganda stations" off the air, the FCC did not flex its muscle significantly to affect programming during the 1930s and 1940s.[23]

In 1943, the Supreme Court affirmed the FCC's broad powers over the broadcasting industry in its landmark ruling, *National Broadcasting Co. v. United States.*[24] This decision held that the public interest standard is the touchstone of FCC authority; that the standard is not unconstitutionally vague; that the scarcity rationale justifies the public interest standard; and that FCC license revocations and nonrenewals do not violate the First Amendment rights of broadcasters.

Despite the FCC's reticence toward content regulation in the 1930s, the changing economies of network radio and proliferation of entertainment programming prompted the Commission to issue another general policy statement about programming in 1946.[25] The *Blue Book* specified the means the FCC would employ to assess the public interest performance of licensees at

renewal time. It required four basic components: live local programs, public affairs programming, limits on excessive advertising, and "sustaining" programs. (Sustaining programs were unsponsored network shows that were deliberately created to showcase high-quality programming having experimental formats or appealing to niche audiences.)

Although it had symbolic importance, the *Blue Book* had no legal force. The FCC never ratified or rejected *Blue Book* guidelines. Many considered the Commission's goals in developing the guidelines laudable, even to public trustees of the airwaves, the idea of Government mandating specific programming was viewed as contrary to the First Amendment. Nonetheless, the National Association of Broadcasters, which had a voluntary code of programming standards, used this occasion to issue a new and stronger code in 1948.[26]

The challenge for the FCC, then and on other occasions since, has been to give substance to the broad public interest standard without becoming too prescriptive or intrusive. This task is inherently difficult because the first duty—to ensure licensee compliance with public trustee responsibilities—quickly threatens to run athwart the First Amendment. During the late 1950s, scandals involving rigged quiz shows and radio "payola"—paying of bribes for radio airplay of certain songs—shook public confidence in broadcasting.[27] The FCC decided that it was an appropriate moment to clarify the meaning of the public interest standard once again and to articulate guidelines for programming.

The result was 19 days of hearings and testimony from more than 90 witnesses, culminating in the FCC's 1960 report, *Report and Statement of Policy re: Commission en banc Programming Inquiry.*[28] Widely known as the *1960 Programming Policy Statement*, the report listed 14 "major elements usually necessary to the public interest":[29]

1. Opportunity for local self-expression.
2. The development and use of local talent.
3. Programs for children.
4. Religious programs.
5. Educational programs.
6. Public affairs programs.
7. Editorialization by licensees.
8. Political broadcasts.
9. Agricultural programs.
10. News programs.
11. Weather and market services.
12. Sports programs.
13. Service to minority groups.
14. Entertainment programming.

The FCC noted that the categories were not intended as "a rigid mold or fixed formula for station operations," but rather were "indicia of the types and areas of service which, on the basis of experience, have usually been accepted by broadcasters as more or less included in the practical definition of community needs and interests."[30]

This general approach to defining the public interest standard prevailed for the next two decades. In the years following the *1960 Programming Policy Statement*, the FCC adopted guidelines for minimum amounts of news, public affairs, and other non-entertainment programming,[31] and primetime access rules (to encourage non-network and local programming).[32]

Without specifying actual program content, the FCC's goal was to mandate certain market parameters as an indirect means of stimulating programming of civic importance.

During the 1980s, the FCC's vision of the public interest standard—and how to achieve diverse programming—underwent a significant change. As new media industries arose and a new set of FCC Commissioners took office, the FCC made a major policy shift by adopting a marketplace approach to public interest goals.[33] In essence, the FCC held that competition would adequately serve public needs and that federally mandated obligations were both too vague to be enforced properly and too much of a threat to broadcasters' First Amendment rights.[34] Many citizen groups argued that the new policy was tantamount to abandoning the public interest mandate entirely.

Pursuant to its marketplace approach, the FCC embarked on a sweeping program of deregulation, eliminating a number of long-standing rules designed to promote program diversity, localism, and compliance with public interest standards. These rules included requirements to maintain program logs, limit advertising time, air minimum amounts of public affairs programming, and formally ascertain community needs.[35] The license renewal process—historically, the time at which a station's public interest performance is formally evaluated—was shortened and made virtually automatic through a so-called "postcard renewal" process.[36] The FCC also abolished most elements of the Fairness Doctrine, which had long functioned as the centerpiece of the public interest standard.[37]

In 1996, Congress expanded the deregulatory approach of the 1980s with its enactment of the Telecommunications Act.[38] Among other things, the Act extended the length of television broadcast licenses from 5 years to 8 years[39] and instituted new license renewal procedures that made it more difficult for competitors to compete for an existing broadcast license.[40] The Telecommunications Act also lifted limits on the number of stations that a single company could own, a rule that historically was intended to promote greater diversity in programming.[41]

The range of programming has expanded as the number of broadcasting stations and other media has proliferated over the past 20 years. Yet market forces have not necessarily generated the kinds of quality, noncommercial programming that Congress, the FCC, and others envisioned. Hence, Congress and the FCC have retained rules regarding children's educational programming and candidate access, among other things.

Broadcasting as a Forum for Political Discourse

Candidate Access to the Airwaves. Although Congress gave broadcasters broad editorial control of the airwaves under the Communications Act, it retained two common-carrier-like provisions to ensure access for legally qualified candidates for Federal office. The "equal opportunities" provision of the Act—often referred to as "equal time," or Section 315—gives candidates the legal right to airtime if their opponents are given or buy airtime.[42] In addition, in the early 1970s Congress determined that it was in the public interest to expand Federal candidates' rights to obtain "reasonable access" to airtime. It enacted Section 312(a)(7) of the

Communications Act, the practical effect of which is to give candidates the right to buy at least some airtime and to specify the format and placement of their ads.[43]

Until 1959, the "equal opportunities" rules were enforced without complication. That year, Lar Daly, a political opponent of Chicago Mayor Richard Daley, demanded free airtime from a TV station after Mayor Daley was shown at a ceremonial event on the evening news. This unexpected use of Section 315 prompted Congress to amend it, exempting four categories of news programs from equal-opportunity requirements. Another complication arose in 1960 when Congress decided to suspend the rules to allow the Kennedy-Nixon debates to proceed without networks having to grant airtime to minor candidates. This exception for candidate debates was formalized and broadened in 1975, when the FCC ruled that candidate debates are "bona fide news events" and therefore covered by Section 315 exemptions.[44]

The FCC has issued other rules governing candidate access to the airwaves. For instance, the *Zapple* rule requires that if a broadcaster gives or sells airtime to supporters of one candidate, it must give or sell similar airtime to supporters of opposing candidates.[45] In the same vein, the FCC has mandated that candidates have a right of reply to political editorials and candidate endorsements and attacks made by licensees.[46] If a broadcast licensee airs an editorial that either endorses or opposes a legally qualified candidate, the licensee must notify all other candidates for that particular office within 24 hours, provide them with a script or tape, and offer them a "reasonable opportunity to respond through the use of the licensee's broadcast facilities."[47]

Congress also guaranteed that if a broadcaster offers to sell time to political candidates (including State and local candidates), the broadcaster must charge them the "lowest unit charge of the station" for the "same class and amount of time for the same period," during the 45 days preceding a primary election and the 60 days preceding a general or special election.[48]

Although candidates for Federal office have access to the airwaves under prescribed conditions, political editorial advertising that is not bought by candidates or that addresses issues without a plea to vote for a particular candidate does not enjoy such protection. The 1973 Supreme Court ruling in *CBS v. Democratic National Committee* held that broadcasters have total discretion over whether to accept or reject editorial advertisements.[49] Essentially, the Court held that broadcasters, as licensees, enjoy broad editorial control to serve the public interest and need not function as common carriers open to any paying customer. But this editorial control was justified in part, the Court noted, because the Fairness Doctrine (discussed below) and broadcast news otherwise ensure that the public can hear diverse perspectives on controversial issues.

Citizen Access to the Airwaves. For many years, the chief legal vehicle for citizens to gain direct access to the airwaves—or hear diverse viewpoints on controversial public issues—was the Fairness Doctrine. The principles behind the Fairness Doctrine were first expressed in 1929 in guidelines issued by the FRC, with regard to *Great Lakes Broadcasting Co.*[50] That Com-

mission statement affirmed the need for broadcasters to serve a diverse public with well-rounded programming.

In an effort to be even-handed, the FCC held in the *Mayflower* ruling in 1941 that a broadcast station could *never* editorialize because it would flout the public interest mandate that all sides of a controversial issue be fairly presented. Licensees, the FCC said, must present "all sides of important public questions fairly, objectively and without bias."[51]

By 1949, in its *Report on Editorializing by Broadcast Licensees*, the Commission reversed its *Mayflower* ruling that editorializing was inconsistent with the public interest.[52] But the FCC reaffirmed its holding that licensees must not use their stations "for the private interest, whims or caprices [of licensees], but in a manner which will serve the community generally."[53] To achieve this goal, the FCC promulgated the "Fairness Doctrine" to ensure that "all sides of important public questions [are presented] fairly."[54]

For decades, the Fairness Doctrine was seen as a primary feature of the public interest standard. It had two prongs. One required that broadcasters devote a reasonable amount of time to cover controversial issues of public importance.[55] The other required that they provide a reasonable opportunity for presentation of contrasting viewpoints.[56] Compliance with the Fairness Doctrine was considered a major performance criterion at license renewal time.

In the 1960s, procedures for enforcing the Fairness Doctrine were fortified.[57] Complaints about one-sided coverage were adjudicated, not just at license renewal time as part of a station's overall performance, but also on a case-by-case basis.[58] This change increased the gravity of complaints and encouraged greater FCC involvement with broadcast content.

In addition, existing principles of the Fairness Doctrine were enforced more aggressively, particularly with respect to commercial advertising, news coverage, and personal attacks. In 1963, the FCC formally articulated the principle that the presentation of only one side of an issue during a sponsored program (such as an attack on the proposed Nuclear Test Ban Treaty) required free airtime for opposing views—a rule known as the *Cullman Doctrine*.[59] Cigarette advertising, and later, controversial advertising in general, also became subject to the Fairness Doctrine.[60] In 1967 the Commission formalized its "personal attack rule" and political editorial policies in specific and specialized rules.[61]

Broadcasters, objecting to the "chilling effects" of the Fairness Doctrine on their free speech, eventually challenged its constitutionality.[62] The case that came before the U.S. Supreme Court involved Red Lion Broadcasting of Red Lion, Pennsylvania, which had refused to give writer Fred J. Cook an opportunity to reply to a personal attack on him during a paid program. Cook sued, citing the Fairness Doctrine, and prevailed in the Supreme Court.[63]

The landmark *Red Lion Broadcasting v. FCC* decision in 1969 upheld the constitutionality of the public interest standard in general and the Fairness Doctrine in particular.[64] One of the oft-quoted principles of the Supreme Court's decision echoes Herbert Hoover and the Federal Radio Commission: "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[65]

Over the decades, the legal contours of the Fairness Doctrine changed—its applicability to advertising had been rescinded, for example.[66] To address these changes, the FCC in 1974 issued *The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standard of the Communications Act, Fairness Report* to guide broadcasters and the public.[67] The Fairness Doctrine was in its heyday and citizen groups and others periodically complained about one-sided coverage and negotiated airtime to respond. For their part, broadcasters complained that the rule had a "chilling effect" on their free speech by discouraging them from airing programming on controversial issues.

In 1985, the FCC agreed and determined that the Fairness Doctrine was incompatible with the public interest.[68] Because of legal contention over whether the doctrine was a statutory or regulatory creation—and thus over who had the authority to revoke it—the FCC invited either Congress or the courts to make a determination. The U.S. Court of Appeals for the D.C. Circuit obliged by declaring that the FCC had the authority to rescind the Fairness Doctrine.[69] Although Congress attempted to codify the doctrine through legislation, a presidential veto quashed their effort and, in 1987, the FCC rescinded the Fairness Doctrine pursuant to the Circuit Court ruling.[70]

Broadcasting as a Force for Localism

Another long-standing tradition in broadcast regulation has been the affirmative need of stations to serve their local communities. The principle was adopted by the FRC and the FCC has cited it periodically as an important component of programming and the license renewal process.[71]

Two of the four programming requirements cited by the *Blue Book* in 1946 were "local live programs" and "programming devoted to discussion of local public issues."[72] The *1960 Program Policy Statement* gave a similar emphasis, citing "opportunity for local self-expression" and "the development and use of local talent" as the first 2 of 14 programming priorities.[73] This statement also held that the "principal ingredient" of the public interest standard "consists of a diligent, positive and continuing effort by the licensee to discover and fulfill the tastes, needs and desires of his service area. If he has accomplished this, he has met this public responsibility."[74]

The concept of seeking out the needs of the local audience, known as "ascertainment," is a procedure that many broadcasters follow as a simple matter of good business practice. But others have been less conscientious. Deficiencies in local engagement and broadcasters' desire for certainty as to what was expected of them prompted the FCC to issue a formal *Ascertainment Primer* in 1971 to "aid broadcasters in being more responsive to the problems of their communities" and to "add more certainty to their efforts in meeting Commission standards."[75] The primer advises broadcasters to consult with community leaders and members of the general public in developing suitable local programming and public service announcements.

Although some television stations criticized ascertainment procedures as empty and costly formalisms, many community leaders saw the procedures as a useful requirement that can lead

to responsive local programming. In any case, the FCC removed formal ascertainment requirements from its books in 1984 as part of its new deregulatory approach.[76] The FCC now relies on broadcasters and the marketplace to meet their general obligation to serve their local communities.

Localism was one reason why Congress enacted the 1962 "all-channel" law—a law that required that all television receivers be capable of receiving both VHF and UHF signals. The idea, according to a House committee report, was to "permit all communities of appreciable size to have at least one television station as an outlet for local self-expression."[77] With varying degrees of success, the FCC has also sought to promote locally originated programming through the Prime Time Access Rule (a rule that once limited networks to 3 hours of programming during primetime, but has since been repealed) and through policy statements that mention local news and public affairs programming as inherent to the public interest standard.[78]

The bond between broadcasters and their local communities was given a new and stronger dimension in the 1960s as a result of *United Church of Christ v. FCC*.[79] In 1964, after the station owner of WLBT in Jackson, Mississippi, aired a program urging racial segregation but refused to air the views of civil rights activists or even to meet with them, the United Church of Christ and others petitioned for legal standing to challenge the renewal of WLBT's broadcast license. A Circuit Court ruling in 1966 held that citizens have the right to participate in the FCC license renewal process.[80] This ruling opened the door to active citizen participation with local broadcasting and the FCC, a major development that gave greater substance to the principle that broadcast licensees must serve their local communities.

Localism has been such a central feature of broadcast television that Congress in 1992 declared: "A primary objective and benefit of our Nation's system of regulation of television broadcasting is the local origination of programming. There is a substantial governmental interest in ensuring its continuation."[81] Pursuant to this and other goals, Congress enacted Sections 4 through 6 of the Cable Television Consumer Protection and Competitive Act of 1992 to ensure that local broadcast programming would be available to the millions of Americans who cannot afford cable TV or do not have access to free local programming.[82] The so-called "must-carry" rules that resulted require cable operators to distribute broadcast television programming over their systems.[83] Although the cable industry challenged the constitutionality of must-carry rules, the Supreme Court in *Turner Broadcasting v. FCC* recognized Congress's rationale and upheld the must-carry rules as consistent with the First Amendment.[84]

As must-carry and other regulations illustrate, policymakers view broadcast television primarily as a local service. Community programming and service are public interest responsibilities that distinguish broadcasting from most other electronic media.

The Public Interest in Children's Educational Programming

Until 1960, when the FCC's *Program Policy Statement* cited children's programming as one of the 14 components "usually necessary to meet the public interest, needs and desires of the

community," the public interest standard did not explicitly mention the needs of children.[85] Fulfillment of that commitment has been uneven, because of commercial pressures on broadcasters to expand the number of advertising minutes per hour. Moreover, it is difficult to define "quality" programming in an enforceable way.

The debate over children's television has revolved mainly around specific ways in which children's programming could or could not be exempted from the customary workings of the marketplace to produce "better" programming. The earliest, most ambitious attempt to develop extra-market standards for children's television was initiated by Action for Children's Television. The group sought 14 hours of children's programming per week per station; age-appropriate programming for different groups of children; bans on performers promoting products during programs; and the clustering of commercials at the beginning and end of programs.[86] (In the meantime, on a separate front, a new genre of noncommercial children's programming, exemplified by *Sesame Street*, arose, largely insulated from customary commercial pressures.)

The FCC initiated a rulemaking on children's television in 1971,[87] and what ultimately resulted, in 1973, were a number of voluntary changes to the National Association of Broadcasters' code. The NAB agreed to separate commercials from programming and ban host selling; to forbid ads for vitamins and drugs during children's shows; and to reduce the number of ads per hour from 16 minutes to 12 minutes during weekdays and to 9 minutes during the weekend.[88]

After the NAB amended its voluntary industry code, the FCC chose not to exercise its authority and issue new requirements for children's programming. The Commission did, however, issue a *1974 Policy Statement* in which it stated, "broadcasters have a special obligation to serve children."[89] The statement had no specific mandates, opting instead for a general, ad hoc approach to the problems documented. Still, the authority of the FCC to require programming to meet the needs of children was later upheld by the D.C. Circuit Court in *ACT v. FCC*, which wrote: "It seems to us that the use of television to further the educational and cultural development of America's children bears a direct relationship to the licensee's obligations under the Communications Act to operate in the 'public interest.'"[90]

In 1975, reporting rules for children's programming were tightened.[91] Guidelines were reaffirmed in the *1979 Children's Television Report*, which determined that self-regulation was not working.[92] The 1979 report showed continued shortcomings[93] and proposed somewhat more prescriptive rules.[94]

This initiative never came to fruition, however, as a new set of commissioners took office in the early 1980s and a new chairman, Mark Fowler, decided in 1984 that the marketplace could sufficiently meet children's needs and serve the public interest.[95] On this basis, the FCC repealed the *1974 Policy Statement* that stations should air educational and informational programming for children.[96] Critics charged that the amount of children's programming dramatically declined as a result and that the toy merchandising tie-ins to programming increased.[97] Meanwhile, during the Reagan Administration, the Department of Justice success-

fully challenged a provision in the NAB's voluntary code that limited certain advertising practices as a violation of antitrust law.[98] After this action in 1982, the NAB decided to eliminate the remainder of its code, including its limits on children's advertising practices.

Disturbed by the failure of a deregulated marketplace to generate adequate educational programming for children and to curb over-commercialization, Congress in 1990 enacted the Children's Television Act of 1990.[99] The Act mandated that advertising on children's programming be limited to 12 minutes per hour during weekdays and 10.5 minutes during weekends.[100] The Act also declared that the "educational and informational needs of children" would be a criterion for assessing a broadcaster's public interest performance at license renewal time.[101]

Under Chairman Hundt, the FCC developed processing guidelines that ensured automatic license renewals for stations that aired 3 hours of children's educational programming but full Commission review for those stations that did not.[102] It also issued more specific definitions of what constitutes educational and informational programming for children.[103]

The public interest in affirmatively serving children has had a number of other expressions. The Telecommunications Act of 1996 encouraged the television industry to develop a voluntary ratings system that allows parents to assess the suitability of programming for their children. This measure is designed for use in conjunction with the so-called V-chip in television sets, which will enable parents to block objectionable programming.

Access by Persons with Disabilities

Just as Congress has expanded choices for children and parents through Federal mandates, it has sought to expand television access for individuals with disabilities. These efforts have primarily focused on the expansion of closed captioning and the use of video descriptions.

Since 1976, the FCC has reserved Line 21 of the vertical blanking interval of analog television signals for the transmission of closed captioning. The captions, which parallel the audio content of television programming, are decoded and generated into visual characters which are displayed on TV screens. Captioning services first began in the early 1980's, through the voluntary efforts of the Public Broadcasting System and the major commercial broadcasting networks. Since that time, the number of programs broadcast with captions has grown dramatically, and captioning has become widely used among the 28 million Americans who are deaf and hard of hearing, among individuals learning English as a second language, and among individuals seeking to attain literacy.

Congress has recognized the public interest in expanding captioning access through two key legislative acts. The Television Decoder Circuitry Act (TDCA), passed in 1990, requires all television sets with screens 13 inches or larger manufactured or imported into the United States after July 1, 1993, to display closed captions through a "decoder chip" built into the sets.[104] Prior to the TDCA, individuals were required to purchase expensive and cumbersome external decoder equipment to receive captions. The TDCA—originally patterned after the All Channel Receiver Act of 1962 which mandated the inclusion of UHF tuners in all televi-

sion sets[105]—was intended to expand the caption viewing audience, and thereby create the necessary economic incentives for networks to caption more of their programs. Anticipating the advent of digital television technologies, Congress also included a section in the TDCA requiring the FCC to ensure that, as these technologies are deployed, closed captions will continue to be available to viewers without the need for separate decoders.

Although the TDCA had been designed to provide sufficient market incentive for the continued expansion of captioned programming, the early 1990's did not see a significant increase in captioning on certain types of programming, including daytime and cable programming. In order to address this situation, Congress enacted Section 305 of the Telecommunications Act of 1996,[106] which sets forth extensive requirements for the provision of closed captions on television. An FCC rulemaking implementing this section[107] requires 100 percent of all non-exempt "new" programming, defined as programming first published or exhibited after January 1, 1998, to be captioned over a period of 8 years. Seventy-five percent of older or "pre-rule" non-exempt programming, first published or exhibited prior to January 1, 1998, must be captioned over a 10-year period, by 2008. The FCC's rules exempt, *inter alia,* advertisements under 5 minutes, interstitial and promotional programming, limited late-night programming, and programming by new networks during their first 4 years of existence. An additional exemption exists for small programming providers with annual gross revenues of under $3 million,[108] and all programming providers are permitted to limit their expenditures on captioning to 2 percent of their annual gross revenues.[109]

In Section 305 of the Telecommunications Act, Congress also recognized the need to expand television access to blind and visually disabled persons. That section directed the FCC to conduct a study on the feasibility of requiring video descriptions on television programming. Video Descriptions consist of verbal descriptions of key visual elements in a video program, and offer, for example, information about settings, gestures, costumes, and actions. In the resulting Video Accessibility Report[110] to Congress, the FCC concluded that the record was insufficient to assess appropriate methods and schedules for phasing in video description. The FCC continues to monitor this issue through its annual report on competition in video markets.

Equal Employment Opportunity

Ensuring that equal employment opportunities exist at the workplaces of broadcast licensees is another important component of the public interest standard. Equal employment opportunity (EEO) is a well-established national policy. Mandated first by Section VII of the Civil Rights Act of 1964, this policy is currently overseen by the Equal Employment Opportunities Commission and the Department of Justice.[111] Broadcast licensees must provide equal employment opportunities to meet the public interest standard. Authority to ensure compliance with EEO requirements is within the FCC's expansive powers to ensure that licensees serve the "public interest, convenience and necessity," as specified in the Communications Act.[112] The FCC is obliged to ensure that licensees act as responsible public trustees, which requires an attentiveness to the concerns of members of minority groups and women in a number of areas.[113]

For example, the character qualifications of broadcast licensees is one factor that the FCC must consider in granting licenses, a principle that may entail practices that affect members of minority groups and women.[114] Serious questions about the character of a licensee would be raised if a broadcaster consistently discriminated in its employment practices. Similarly, the FCC, in implementing the public interest standard, has long sought to ensure that diverse viewpoints, including those of minorities, are expressed in programming and included in programming decisions.[115] The FCC has determined that one important way of fulfilling this mandate is through the recruitment and employment of a reasonable number of members of minority groups, and women.[116]

Historically, the public interest standard has required that licensees ascertain community needs as part of their public trustee function, in order to help make programming more responsive to local communities. A licensee who discriminates in employment policies or practices is not likely to fulfill the ascertainment function well. As the FCC noted in 1968, the existence of discriminatory employment practices "immediately raises the question of whether [the licensee] is consulting in good faith with Negro community leaders concerning programming to serve the area's needs and interests. Indeed, the very fact of discriminatory hiring policies may effectively cut the licensee off from success in such efforts."[117]

As these examples suggest, although FCC policymaking in equal employment opportunities supports a general national policy, it is based on the distinctive character of broadcasting as a unique mass medium and by the specific statutory mandate of the Communications Act and its administrative implementation.

The FCC first issued EEO rules in 1969 when it prohibited discrimination among licensees and required that they review their employment policies and practices to identify any barriers to equal opportunities.[118] The FCC's policies and enforcement have evolved over the years to take account of other, more specific needs. Broadly speaking, FCC rules prohibit broadcasters from overt discrimination on the basis of race, color, national origin, religion, and gender.[119] They have also required broadcasters to show that they have made systematic efforts to recruit, hire, and promote members of minority groups and women.[120]

In addition, the rules require annual reporting of data showing the results of those efforts.[121] Since 1973, the Commission's assessment reviewing this employment data has become a regular part of the assessment of broadcasters' license renewal applications. The FCC requires that broadcasters whose results fall below certain benchmarks demonstrate that they have sought to recruit members of minority groups and women.[122] Since the FCC adopted its EEO rules, broadcast industry employment at all levels, including management, has improved more rapidly than in the rest of the American workforce.[123]

Specific regulatory approaches for promoting equal employment opportunity in broadcasting have changed over time and are likely to continue to evolve. The FCC's basic commitment to promoting equal employment opportunity in broadcasting and diversity of programming and viewpoints remains unchanged.[124]

The FCC's EEO policy was modified in 1998 when the U.S. Court of Appeals for the D.C. Circuit declared its minority recruitment rules unconstitutional.[125] It is unclear to some parties whether the ruling affects only the FCC's processing guidelines, or if it also undermines the FCC's broader authority even to issue EEO recruitment rules. On November 19, 1998, in response to the Court of Appeals's ruling, the FCC proposed new equal employment opportunity rules that would require broadcast licensees to inform women and members of minority groups of job vacancies.[126] (Unlike the previous EEO rules, the new rules would not require licensees to assess how the composition of their employment profiles compares with the composition of the local labor force, nor would the FCC use such comparisons—sometimes referred to as "processing guidelines"—when assessing a licensee's EEO program.)[127] In its Notice of Proposed Rulemaking, the FCC invited comment on its belief that the FCC has ample statutory authority to retain the anti-discrimination provisions of the broadcast EEO rules.[128]

Over time, shifts in the regulatory implementation of EEO goals are inevitable. But the FCC's authority to advance equal employment opportunities remains intact and is an important component of the public interest standard.

CONCLUSION

Although some of its specific applications have been controversial, the public interest standard is widely accepted as integral to broadcasting. The standard provides the legal basis for promoting greater diversity in programming, more robust political discussion, candidate access to the airwaves, programming that serves local communities, children's educational programming, access to programming for Americans with disabilities, and equal employment opportunities within broadcasting.

As the new era of digital television arrives, the times demand a thoughtful re-engagement with the meaning of the public interest standard. Many existing principles of public interest performance will likely need new interpretations in light of the new technology, market conditions, and cultural needs. In this spirit, the Advisory Committee turns now to some imaginative, flexible, and effective strategies that it believes will help ensure that the traditional public purposes of broadcast television will continue to be met in the digital era.

ENDNOTES

1 Communications Act of 1934, ch. 652, 48 Stat.1064 (codified in 47 U.S.C. §§ 151-611 (1994); Radio Act of 1927, ch. 169, 44 Stat. 1162 (repealed 1934).

2 Radio Act of 1912, ch. 287, § 1, 37 Stat. 302.

3 *See, generally,* A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934 (Max D. Paglin ed. 1989). See the legislative history of the Communications Act recounted in *CBS Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 103 (1973); *see also* Tracy Westen, *Government-Created Scarcity: Thinking About Broadcast Regulation and the First Amendment, in* DIGITAL BROADCASTING AND THE PUBLIC INTEREST 47 (Charles M. Firestone & Amy Korzick Garmer, eds. 1998).

[4] *See* Robert W. McChesney, TELECOMMUNICATIONS, MASS MEDIA AND DEMOCRACY: THE BATTLE FOR CONTROL OF U.S. BROADCASTING 1928-1935 at 18 and n. 27 (citing. Louis G. Caldwell, *The Standard of Public Interest, Convenience or Necessity, as Used in the Radio Act of 1927*, 1 AIR L.R. 295 (1930) and William D. Rowland, Jr., *The Meaning of The Public Interest in Communications Policy—Part I: Its Origins in State and Federal Regulation*, Presentation Before the International Communications Association (Annual Meeting, 1989)).

[5] Although the Communications Act does not expressly obligate broadcasters to serve the public interest, it authorizes the Commission to perform certain regulatory functions "from time to time, as the public convenience, interest, or necessity requires." Communications Act of 1934, ch. 652, § 303 (codified in 47 U.S.C. § 303 (1994)). It specifies that Commission may issue, modify, or renew a broadcast license if it determines that the "public interest, convenience, or necessity would be served" thereby. *Id.* § 309(a), 47 U.S.C. § 309(a) (1994). It also provides that broadcast licenses may not be transferred "unless the Commission shall, after securing full information, decide that said transfer is in the public interest." *Id.* § 310(b), 47 U.S.C. § 310(b) (1994). *See also* Radio Act of 1927, ch. 169, §§ 4, 11, 12, 44 Stat. 1163, 1167 (setting forth similar provisions).

[6] *Schaeffer Radio Co.* (FRC 1930) (quoted in John W. Willis, *The Federal Radio Commission and the Public Service Responsibility of Broadcast Licensees*, 11 FED. COM. B.J. 5, 14 (1950)).

[7] *See e.g., Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 380 (1969) (citing *Nat'l. Broad. Co. v. U.S.*, 319 U.S. 190, 219 (1943) and noting that the "mandate to the FCC to assure that broadcasters operate in the public interest is a broad one...")

[8] *See* 47 U.S.C. §326 (1994) ("Nothing...shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station"); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 650 (1994) ("the FCC's oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations").

[9] *Red Lion Broad. Co. supra* note 7.

[10] *Id.* at 388-89.

[11] *Id.* at 389.

[12] The Supreme Court has either relied on *Red Lion* or cited it approvingly in *CBS Inc.* 412 U.S. 94, 123 (1973); *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 798-800 (1978); *CBS Inc. v. FCC*, 453 U.S. 367, 395-96 (1981); *FCC v. League of Women Voters* 468 U.S. 364, 377-78 (1984); and *Turner Broad. Sys, Inc.. v. FCC*, 512 U.S. 622, 637-638 (1994). Some constitutional law scholars, however, cite language in many of these cases to suggest that the Court might be willing to reconsider *Red Lion* under appropriate circumstances.

[13] Expressions of these viewpoints include THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR. REGULATING BROADCAST PROGRAMMING 204-19 (1994) and Laurence H. Winer, *Public Interest Obligations and First Principles* at 4-5, Issues in Broadcasting and the Public Interest, Paper No. 1 (The Media Institute, 1998).

[14] *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("the best test

of truth is the power of the thought to get itself accepted in the competition of the market").

[15] CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH xvii (The Free Press 1995) (1993).

[16] A key statement of Brandeis' understanding of the First Amendment can be seen in *Whitney v. California*, 274 U.S. 357, 372 (1927), in which Brandeis writes that "the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government."

[17] An illuminating review of Brandeis' views of free speech can be found in Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653 (1988), and in John Rawls, POLITICAL LIBERALISM 351-56 (1993).

[18] *See* SUNSTEIN *supra note 15.*

[19] *Id.* at 249.

[20] *Id.* at 101-103.

[21] Robert Corn-Revere, "Self-Regulation and the Public Interest," *in* DIGITAL BROADCASTING AND THE PUBLIC INTEREST 63 (Charles M. Firestone & Amy Korzick Garmer, eds. 1998). For similar perspectives, see Robert Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 MICH. L. REV. 1517 (1997) and Laurence H. Winer, *Deficiencies of the "Aspen Matrix"* at 12-13, *Issues in Broadcasting and the Public Interest,* Paper No. 3 (The Media Institute 1998).

[22] *Great Lakes Broad. Co.*, 3 FRC Ann. Rep. 32, 34 (1929) (quoted in J. Roger Wollenberg, *The FCC as Arbiter of "The Public Interest, Convenience, and Necessity,"* in Paglin, *supra* note 3, at 61.)

[23] One such propaganda station, for example, featured an evangelist stridently attacking other religions; another featured a "goat-gland doctor" hawking his own dubious medicines. *See* Erwin Krasnow, *The "Public Interest" Standard: The Elusive Search for the Holy Grail*, 50 FED. COM. L.J. 605, 613 (1998).

[24] 319 U.S. 190 (1943).

[25] Formally entitled, *Public Service Responsiblity of Licensees,* this document became known as the *Blue Book* because of its blue cover.

[26] *See generally,* KRATTENMAKER, *supra* note 13; JOHN R. BITTNER, LAW AND REGULATION OF ELECTRONIC MEDIA, (2nd ed. Prentice Hall 1994) (recounting history of the regulation of broadcast programming).

[27] *Id.*

[28] *En banc Programming Inquiry,* 44 FCC 2303 (1960).

[29] *Id.* at 2314.

[30] *Id.* at 2313.

[31] FCC guidelines on non-entertainment programming, contained in delegations of authority to FCC staff, provided standards of at least 5 percent local programming, 5 percent informational programming (defined as news and public affairs), and 10 percent total non-

entertainment programming. In general, any renewal or assignment application that fell short of the guidelines had to be sent to the full Commission for action. These guidelines were adopted in 1976 and repealed by the FCC in 1984. *Amendments to Delegations of Authority*, 59 FCC 2d 491, 493 (1976).

[32] The Prime Time Access Rule generally limited the television networks from offering more than 3 hours of primetime entertainment programming per day. The rationale for the rule was to allow non-network production houses to produce programming for the vacated time periods. *Amendment of Part 73 of the Commission's Rules and Regulations with Respect to Competition and Responsibility in Network Television Broadcasting*, Report and Order, 23 FCC 2d 382, 385-87 (1970), *aff'd sub nom. Mt. Mansfield Television Inc. v. FCC*, 442 F.2d 470 (2d Cir. 1971). The Commission modified the Prime Time Access Rule in 1974. *Consideration of the Operation of, and Possible Changes in, the "Prime Time Access Rule" in Section 73.658(k) of the Commission's Rules*, 44 FCC 2d 1081 (1974), *aff'd sub nom. National Ass'n of Indep. Television Producers and Distributors v. FCC*, 516 F.2d 526 (2d Cir. 1975). The FCC repealed the rules in 1995. *Review of the Prime Time Access Rule*, 11 FCC Rcd 546 (1995) (repealing the Prime Time Access rule effective Aug. 30, 1996).

[33] The Commission commenced its radio deregulation in 1979 under Chairman Charles Ferris, a Carter appointee. President Reagan's choice for Commission Chairman, Mark S. Fowler, aggressively pursued television deregulation.

[34] A leading statement of this approach to FCC regulation of broadcasters is set forth in a law review article by the then FCC Chairman and his legal assistant. Mark Fowler and Daniel Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEXAS L. REV. 2087 (1982).

[35] These rules were all repealed in the same order, *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, 98 FCC 2d 1076 (1984) *recon. denied*; 104 FCC 2d 358 (1986), *affd in part and remanded in part sub nom. Action for Children's Television v. FCC*, 821 F.2d 741 (D.C. Cir. 1987). The major litigation on deregulation and repeal of program guidelines concerned the repeal of radio rules in 1981, and was over before television deregulation was adopted in 1984. *Deregulation of Radio*, 84 FCC 2d 968, *recon. denied*, 87 FCC 2d 797 (1981), *aff'd in part and remanded in part sub nom. Office of Communications of the United Church of Christ v. FCC*, 709 F.2d 1413 (D.C. Cir. 1983).

[36] Postcard renewal was adopted in *Revision of Applications for Renewals of License of Commercial and Non-Commercial AM, FM and Television Licensees*, 49 RR 2d 740, *recon. denied*, 87 FCC 2d 1127 (1981), *aff'd. sub nom. Black Citizens for A Fair Media v. FCC*, 719 F.2d 407 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1255 (1984).

[37] The legal history of the Fairness Doctrine is complicated, but stated simply, the FCC stopped enforcing most applications of the Fairness Doctrine in *Syracuse Peace Council*, 2 FCC Rcd 5043 (1987), *recon. denied*, 3 FCC Rcd 2035 (1988), *aff'd. sub nom. Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert denied*, 493 U.S. 1019 (1990). In 1992, the Commission announced it would no longer apply the doctrine to ballot issues. *Arkansas AFL-CIO*, 7 FCC Rcd 541 (1992), *aff'd. on other grounds sub nom. Arkansas AFL-CIO v. FCC*,

11 F.3d 1430 (8th Circ. 1993)(*en banc*). Still, the Commission continues to enforce several aspects of the Fairness Doctrine, including the political editorial and personal attack rules. The decision to continue enforcing these rules has been challenged.

[38] Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (codified at 47 U.S.C. 151 et. Seq.) (Feb. 8, 1996).

[39] *Id.* at § 203 (codified at 47 U.S.C. 307(c)).

[40] *Id.* at § 204 (codified at 47 U.S.C. 309(k)).

[41] *Id.* at § 202.

[42] Communications Act of 1934 (as amended), 47 U.S.C. § 315(a).

[43] 47 U.S.C. § 312(a)(7).

[44] *See Codification of the Commission's Political Programming Policies*, Memorandum Opinion and Order, 9 FCC Rcd 551, 651-52 (1994).

[45] *Letter to Nicholas Zapple*, 23 FCC 2d 707 (1970).

[46] 47 C.F.R. § 73.1930.

[47] *Id.*

[48] The lowest unit rate requirement, codified as 47 U.S.C. §, 315(b), was adopted in 1972, in Pub. L. 92-225, and somewhat modified in 1974, in Pub. L. 93-442.

[49] *Columbia Broad. Sys., Democratic National Committee* 412 U.S. 94, 130-31 (1973).

[50] *Great Lakes Broad. Co.,* 3 F.R.C. Ann. Rep. 32 (1929), *rev'd on other grounds,* 37 F.2d 993 (D.C. Cir.), *cert. denied,* 281 U.S. 706 (1930).

[51] *Mayflower Broad. Corp. supra,* note 46, at 340.

[52] *Report on Editorializing by Broadcast Licensees,* 13 FCC 1246, 1258 (1949).

[53] *Id.* at 1248-49.

[54] *See* 47 C.F.R. §73.1910.

[55] *See Red Lion Broad., supra* note 7, at 377-78.

[56] *Id.*

[57] *See Letter to Oren Harris*, 40 FCC 582 (1963).

[58] *Id.* at 583 ("[W]e believe that under the public interest standard itself we must, as far as practicable, determine fairness questions at the time of the complaint rather than awaiting renewal.")

[59] The *Cullman Doctrine* was set forth in a letter decision in 1963. *Cullman Broad. Co., Inc.,* 40 FCC 576 (1963).

[60] This history is complicated, but one landmark case was *Banzhaf v. FCC,* 405 F.2d 1082 (D.C. Cir. 1968), *cert denied,* 396 U.S. 842 (1969), in which the Court of Appeals held that cigarette ads were subject to the Fairness Doctrine. The Commission later held that there was no longer any controversy about the "general [point]... that cigarette smoking is hazardous to public health," so anti-smoking public service announcements did not have to

be balanced with pro-smoking messages. *Formulation of Appropriate Further Regulatory Policies Concerning Cigarette Advertising and AntiSmoking Presentations*, Report and Order, 27 FCC 2d 453 (1970), *aff'd. sub nom. Larus & Brother, Inc. v. FCC*, 477 F.2d 876 (4th Cir. 1971).

[61] The personal attack rule requires licensees to give reply time to persons or groups whose honesty is challenged during discussion of controversial issues. 47 C.F.R. § 73.1920. The political editorial rule permits candidates to reply to licensees' editorial endorsements. 47 C.F.R. § 73.1930. Like *Cullman*, the personal attack and political editorial concepts were integral to the Fairness Doctrine from the outset. Indeed, the *Red Lion* case was itself a personal attack case that predated the 1967 adoption of the specific rules. *Red Lion, supra* note 7. In response to criticism that the application of the Fairness Doctrine in those circumstances was too vague, the FCC adopted specific rules. *Amendment of Part 73 of the Rules to Provide Procedures in the Event of a Personal Attack or Where a Station Editorializes as to Political Candidates*, Memorandum and Order, 8 FCC 2d 721 (1967). The two rules were also upheld in the companion case that was consolidated into *Red Lion* by the Supreme Court. *Red Lion, supra* note 7 at 371-71.

The personal attack and political editorial rules (subsets of the Fairness Doctrine) and the so-called "quasi-equal opportunities" policy (the Zapple rule) have at all times been subject to continued enforcement, even with rescission of the Fairness Doctrine. Letter from Dennis R. Patrick, Chaiman, *Federal Communications Commission* to U.S. Representative John D. Dingell, Chairman, *Committee on Energy and Commerce* (Sept. 22, 1987). In the summer of 1998, however, the FCC declared by a split vote of two-to-two (with Chairman Kennard recused) that it had no majority to repeal the personal attack and political editorial rules. Public Notice, Commission Proceeding Regarding the Personal Attack and Political Editorial Rules, 12 Communications Reg. (P & F) 497 (1998). This decision is being challenged in court. *Id.*

[62] *See, Red Lion, supra* note 7.

[63] *Id.*

[64] *Id.*

[65] *Id.* at 390.

[66] In *Friends of Earth v. FCC*, 449 F.2d 1164 (D.C. Cir. 1971), *remanded sub nom. Complaint by Friends of the Earth Concerning Fairness Doctrine re Station WNBC-TV, New York, N.Y.*, 39 FCC 2d 564 (1973) the Court of Appeals extended *Banzhaf* to gasoline ads. The Commission responded by changing its policy to repeal application of the Fairness Doctrine to all ads. *Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards ofthe Communications Act*, 48 FCC 2d 1, 24-26 (1974), *aff'd. sub. nom. NCCB v. FCC*, 567 F.2d 1095 (D.C. Cir. 1977), *cert. denied,* 436 U.S. 926 (1978) (*1974 Fairness Report*).

[67] *See 1974 Fairness Report supra.*

[68] *Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees,* 102 FCC 2d 145 (1985), *petition for review docketed sub nom. Radio-Television News Directors Ass'n v. FCC,* No. 85-1691 (D.C. Cir. 1985).